Editor's note: Reconsideration denied by order dated June 2, 1978

WILFRED PLOMIS

IBLA 78-60 Decided March 27, 1978

Appeal from a decision of the Eastern States Office, Bureau of Land Management, dated September 27, 1977, dismissing a protest against the issuance of noncompetitive oil and gas leases on acquired lands in which the United States holds a minority interest. ES 14285, ES 16598, ES 16599.

Vacated and remanded.

1. Regulations: Binding on the Secretary--Regulations: Force and Effect as Law

   The Secretary of the Interior is bound by his duly promulgated regulations, and such regulations have the force and effect of law.

2. Oil and Gas Leases: Acquired Lands Leases--Oil and Gas Leases: Future and Fractional Interests--Oil and Gas Leases: Lands Subject to

   Regulations in force prior to October 28, 1976, prohibited, in the absence of extraordinary circumstances, the issuance of oil and gas leases for fractional interests to one who would own less than 50 percent of operating righs in the leased property. The later determination that such a policy may not in general serve the public interest and the expression of the new policy in a revised regulation does not constitute an extraordinary circumstance.

3. Oil and Gas Leases: Applications: Generally--Regulations: Applicability

   A regulation, amended in a manner that benefits a pending application for an oil and

gas lease, may be applied to the pending application in the absence of intervening rights or public interest.

4. Oil and Gas Leases: Applications: Generally--Oil and Gas Leases: Future and Fractional Interests--Regulations: Applicability

Repeal of regulations which prohibit leasing fractional interests to one who would own only a minority of operating rights in the leased property gives priority to an otherwise regular offer which would have had to be rejected under the former regulations, as of the effective date of the repeal, provided that no offers qualified under the former regulation have been received prior to repeal, and that the offer has not been rejected prior to repeal.

5. Oil and Gas Leases: Applications: Drawings--Oil and Gas Leases: Cancellation: Oil and Gas Leases: First Qualified Applicant--Oil and Gas Leases: Future and Fractional Interests

A lease erroneously issued in violation of regulations which prohibit leasing fractional interests to one who would own only a minority of operating rights in the leased property must be canceled if a lease is awarded to another applicant in a drawing held among the first and other offers simultaneously filed following repeal of the regulations.

APPEARANCES: James W. McDade, Esq., McDade & Lee, Washington, D.C., for Sam P. Jones; Wilfred Plomis, pro se.

OPINION BY ADMINISTRATIVE JUDGE RITVO

Wilfred Plomis appeals from a decision of the Eastern States Office, Bureau of Land Management (BLM), dated September 27, 1977, dismissing his protest of the issuance of acquired lands noncompetitive oil and gas leases to Sam P. Jones (hereafter Jones). Involved are three offers covering lands in Mississippi acquired by the Federal Farm Mortgage Corporation, in which lands the United States

holds oil and gas interests of less than 50 percent. 1/ Jones filed offers for the three tracts on August 7, 1974, October 19, 1976, and October 18, 1976, respectively, while appellant filed offers covering the same three tracts at 10 a.m. on October 28, 1976. 2/ A lease issued on Jones' 1974 offer on February 9, 1977, effective March 1, 1977, but appellant's conflicting offer has not been rejected.

On March 22, 1977, appellant protested the issuance of Jones' lease and the possible issuance of leases on Jones' other offers.

Appellant argues that because Jones did not own any of the operating rights in the acquired lands not owned by the United States, his offers should have been rejected pursuant to now superseded 43 CFR 3101.2-5(a) and 43 CFR 3130.4-4 (hereafter the regulations). Each of the regulations contained the following language: "Ordinarily, the issuance of a lease to one who, upon such issuance, would own less than 50 percent of the operating rights in any such tract, will not be regarded as in the public interest, and an offer leading to such results will be rejected." 43 CFR 3130.4-4 was repealed and superseded by provisions proposed at 41 FR 14375 (April 5, 1976) and finally adopted at 41 FR 43149 (September 30, 1976), effective October 28, 1976. 3/ The regulation now reads: "An offer for a fractional present interest noncompetitive lease must be filed on a form approved by the Director in accordance with subpart 3111." Appellant urges that the former language controlled Jones' offers and mandated their rejection, since Jones would neither own a majority of operating rights in the leased property, nor did he show any extraordinary circumstances.

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Offer	Location	U.S. Acres	Interest
ES 14285	W 1/2 SE 1/4 NW 1/4, sec. 32, T. 4 N., R. 12 W., St. Stephens meridian, Marion County, Mississippi	20	7/16
ES 16598	W 1/2 NW 1/4, sec. 36, T. 9 N., R. 16 W., St. Stephens meridian, Covington County, Mississippi	80	1/4
ES 16599	NW 1/4 SE 1/4, SW 1/4 SE 1/4, NE 1/4 SW 1/4, sec. 21, T. 5 N., R. 18 W., St. Stephens meridian Marion County, Mississippi	120	3/8

2/ The record indicates that other offers for the tracts in question were filed simultaneously with appellant's.

3/ The repealing provisions dealt on their face only with 43 CFR 3130.4-4. Since, however, the two regulations are coextensive, 43 CFR 3101.2-5(a) must be considered repealed by implication.

Appellant further argues that his own offers, which were filed following the repeal of the regulations, should have been accepted -- the fact that he did not own any of the outstanding operating rights no longer being a bar to the issuance of a lease. Jones, maintains appellant, should not be permitted to take advantage of the repeal, because his, appellant's, offer constituted an intervening interest.

In its decision of September 27, 1977, BLM rejected appellant's line of reasoning and dismissed his protest. BLM ruled:

> Until the regulations, 43 CFR 3130.4-4, were amended, effective October 28, 1976, the rules stated that ordinarily, if leasing the government's fractional interest to one who, upon such issuance, would own less than 50 percent of the operating rights in any such tract will not be regarded as in the public interest [sic]. This is no longer true. It is now considered to be in the public interest to lease that fractional interest held by the United States regardless of ownership or control of the remaining fractional interest not owned by the United States (Emphasis supplied.)
>
> The rule change notwithstanding, the former regulation did not make rejection of an offer for interest of less than 50% mandatory. It was assumed that the "ordinarily" rule would be followed unless the circumstances in a particular case made it apparent that it would be equally or more in the public interest not to follow the rule. See Sun Oil Company, [67 I.D. 298 (1960)].
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> In view of the above, we find it not in the public interest to cancel oil and gas lease ES 14285. Lease offers ES 16598 and ES 16599 will be adjudicated on their merits.
>
> The protest of Wilfred Plomis is hereby dismissed.

In his appeal appellant repeats his argument made to the Eastern States Office. In reply Jones states:

> Under the regulations in effect prior to October 28, 1976, there was a presumption that issuance of a lease to one who would upon issuance own less than a 50% interest was not in the public interest, but that presumption could be overcome in particular situations. Where the public interest had changed, in such a way as no longer to depend on the percent of a lessee's interest, it was reasonable for the Bureau of Land Management to determine that lease issuance was in the public interest irrespective of lessee's owning less than a 50% interest

> upon lease issuance. The October 28, 1976, amendments to the regulations were a result - not a cause - of such a change in the public interest. Thus offers to lease which would give offeror less than a 50% interest upon issuance became acceptable, under the regulations then in effect, when the public interest had changed, which was necessarily at some time prior to the publication of the amendments to the regulations.

This appeal presented us with two questions. The first is whether the regulations permitted BLM in a particular case to take into account experience that leasing fractional interests was generally in the public interest; and the second is whether Jones should be permitted to take advantage of the regulations' amendment.

[1] In order to approach the problem of construction posed by the first question, we begin by considering the nature of the regulations. The decision whether or not to lease fractional interests in acquired lands has been entrusted by Congress to the Secretary of the Interior when in the Secretary's judgment leasing would be in the public interest. 30 U.S.C. § 354 (1971). All else being equal, the Secretary would be free to consider all factors evaluating the public interest provided that he was not arbitrary or capricious in doing so. Cf. 5 U.S.C. § 706(2)(A) (1970). The Secretary, however, may impose limitations on himself through properly enacted regulations, and once the Secretary has promulgated a regulation he is bound to follow it. Vitarelli v. Seaton, 359 U.S. 535 (1959); Accardi v. Shaughnessy, 347 U.S. 260 (1954); Chapman v. Sheridan-Wyoming Co., 338 U.S. 621, 629 (1950); Electronic Components Corp. of N.C. v. N.L.R.B., 546 F.2d 1088 (4th Cir. 1976); McKay v. Wahlenmaier, 226 F.2d 35 (D.C. Cir. 1955); Arizona Public Service Co., 20 IBLA 120 (1975). Thus, in enacting a regulation, the Secretary may, in effect, freeze the exercise of his discretion in certain situations until the regulation is repealed.

[2] The regulations in the present case represent just such a preemptory exercise of judgment. Having determined that as a general rule leasing fractional interests does not lie in the public interest, he has foreclosed himself and his delegates from reaching the opposite conclusion in general cases while the regulation remains in force.

Although the regulations do not say that a lease will be issued only to an offeror who owns all or substantially all of the present operating rights (as does 43 CFR 3101.2-6(a) with regard to future interests), it does say that leases embracing a minority of operating rights "ordinarily * * * will not be regarded as in the public interest." Such a statement in a regulation is not merely a commentary on the Secretary's current state of mind, it has the force and effect of law. Rodway v. U.S. Department of Agriculture, 514 F.2d 809 (D.C.

Cir. 1975); G.S.A. v. Benson, 415 F.2d 878 (9th Cir. 1969); Whatloff v. U.S., 355 F.2d 473 (8th Cir. 1966); Arizona Public Service Co., supra; Leonard E. Simmons, 12 IBLA 196 (1973). Where only ordinary circumstances comparable to those of other prospective lessees appear, a lease offer leading to such results must be rejected. Jerry Chambers, 18 IBLA 88 (1974).

In Solicitor's Memorandum, M-36750 (August 10, 1959), the Deputy Solicitor explicates the rationale behind the regulations. He explains that the regulations were intended to facilitate development on terms favorable to the public interest by insuring that the Federal lessee would be able to exercise control over the leasehold in states in which unanimity or majority control was required. This Board has noted that rationale. L. E. Lindvay, Sr., 23 IBLA 218 (1976); Jerry Chambers, supra.

Twice, challenges to the policy of the regulations similar to that in the present case have been rejected. In David A. Provinse, A-30162 (July 6, 1964), the Solicitor held that the fact that the non-federal owner of a majority of the mineral interst was at liberty to initiate exploration and development on his own was not in itself sufficient grounds for departing from the ordinary rule proscribing issuance of a lease. This Board has held in Jerry Chambers, supra, that an assertion that state law would sufficiently protect the various interests in the leasehold did not constitute exceptional circumstances. In other words, neither the Solicitor nor this Board has felt it appropriate to consider what are essentially generalized objections to the policy judgment inherent in the regulations. Implicit in the regulations is a determination that Federal control over leases is an important objective and we cannot accept inferences to the contrary as a basis for creating exceptions to the ordinary rule against issuing leases.

Similarly, both the Solicitor and this Board have held that one exceptional circumstance justifying the issuance of a lease to a minority interest holder would be a binding agreement between the lessee and the holder of the nonfederal interest. Jerry Chambers, supra; David A. Provinse, supra; Sun Oil Company, supra; Solicitor's Memorandum M-36570, supra. 4/ This authority, too, assumes that the regulations speak for the judgment that Federal control of leases is an important objective.

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4/ Other extraordinary circumstances include situations where an offeror owns the operating rights to property adjacent to that in which the United States owns a fractional interest. In such a case, the possibility of drainage from the adjacent property or the advantages of unified development may justify leasing the fractional interest. Id.

Recent experience, however, has tended to show the former concept was detrimental to the United States. The notice of proposed rulemaking at 41 FR 14375 states that the proposed amendment of the regulations would:

> eliminate the presumption that issuance of a lease to one who would own less than 50 percent of the operating rights to any tract covered by such lease is contrary to the public interest.
>
> Experience by Bureau of Land Management field offices show that this requirement serves no useful purpose. First, in the vast majority of cases, the government owns 50 percent or more of the mineral right in any given tract. Secondly, private owners usually will lease their interest in these lands even when the government has refused to lease its interest because of the 50 percent limitation. When operations commence, the government then is obligated to petition the courts for a cease and desist order or sue for a proportionate share of the revenues. The public interest can be better served by issuing a lease for the government's fractional interest in mineral rights to a qualified applicant.

This notice did not announce an immediate change in policy. It did not say that the presumption is superfluous and that leases would issue in the public interest despite the requirements of the regulations. The notice says rather that the public interest would be better served by discarding the presumption, amending the regulation, and issuing leases. This emphasizes the fact that the presumption prohibited BLM in individual cases from deciding that, as a general proposition, leasing fractional rights would be in the public interest. BLM may not countermand that judgment as long as the former regulations controlled the issuance of a particular lease, that is, until they were amended. In the instant case, the regulations would have mandated that BLM reject Jones' offer absent a showing of exceptional circumstances, none of which are even suggested to exist here.

[3] We next turn to the question of whether Jones should be permitted to take advantage of repeal of the regulations.

Generally speaking, when a regulation is amended while final action on an application is pending, the regulation as amended applies. Arizona Public Service Co., supra. If, however, the amendment would be beneficial to an applicant or lessee, it will apply only in the absence of intervening interests. Howard S. Bugbee, 29 IBLA 30 (1977); Duncan Miller, 28 IBLA 292 (1977); Norman H. Nielson, 72 I.D. 514 (1965); Henry Offe, 64 I.D. 52 (1957).

As previously mentioned, appellant claims that his lease offers filed October 28, 1976, give rise to an intervening interest against Jones. We agree with this contention, but we do not agree with appellant's further suggestion that his offer be given priority over Jones'.

[4] The situation here is analogous to the case where an over-the-counter offer, which omits required information, has been filed. Such a filing gives the offeror no priority until, prior to rejection, it is amended. C. C. Hughes, 33 IBLA 237 (1977); John Oakason, 21 IBLA 185 (1975); M. P. Shiflet, 15 IBLA 112 (1974). Amendment may be made so long as no qualified offer has been received. Frederick L. Smith, 19 IBLA 162 (1975); cf. Arthur E. Meinhart, 11 IBLA 139, 80 I.D. 395 (1973). In other words, since Jones' offer was never rejected, it gave him priority as of October 28, 1976, the date the regulations were repealed. Had an offer which was qualified under the regulations been filed prior to October 28, 1976, that offer would have taken priority over Jones'. Sun Oil Co., supra. Since, however, appellant and others did not file until October 28, 1976, their priority can be no higher than Jones'.

[5] All else being regular, therefore, leases on the tracts in question should issue pursuant to a simultaneous drawing among Jones, appellant, and the others filing at 10 a.m. on October 28, 1976. 43 CFR 3110.1-6(a). In the event that Jones does not win the drawing for the tract on which his lease has already issued, that lease must be canceled. Cf. Arthur E. Meinhart, 6 IBLA 39 (1972).

The dissent suggests that in any event, Jones' applications carried priority as of 12:01.01 of October 28, 1976. We have found no authority for the concept that an offer defective on one day, but acceptable on the next, can gain priority over offers filed at the moment the State office opens for public business on the next day. The regulations provide that public business can be done only during the hours the office is open to the public.

43 CFR 1821.2-1, Office hours; place for filing, provides:

> (a) The office listed in paragraph (d) of this section are open to the public on Monday through Friday for the filing of applications and other documents and inspection of records from 10 a.m. to 4 p.m., standard time or daylight saving time, whichever is in effect at the city in which the office is located, with the exception of those days when the office may be closed because of a national holiday or by Presidential or other administrative order.
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> (b) Applications and other documents cannot be received for filing by the authorized officer out of office hours, nor elsewhere than at his office; nor

can affidavits or proofs be taken by him except in the regular and public discharge of his ordinary duties.

Again 43 CFR 1821.2-2 states:

> (d) Any document required or permitted to be filed under the regulations of this chapter, which is received in the proper office, either in the mail or by personal delivery when the office is not open to the public, shall be deemed to be filed as of the day and hour the office next opens to the public.

Finally the oil and gas regulation 43 CFR 3111.1-1 reads:

> (a) Application – (1) Forms * * * For the purpose of this part an offer will be considered filed when it is received in the proper office during business hours.

The history and purpose of these regulations are discussed in detail in a recent case: Bob Burch, 32 IBLA 93 (1977). There it was held that a payment received after business hours on one day is deemed to have been made as of the opening of the office to the public on the next day. So here, applications can gain priority only during the hours when the office is open to public business, that is at 10 a.m. on October 28, 1978.

To rule otherwise would sanction and encourage applicants to file premature applications as close as possible to the end of business on one day so that they would gain priority at the moment after the stroke of midnight, to the detriment of those who filed on the stated date. To give priority to such a filer is in violation not only of the regulation, but also of sound public policy.

Therefore, pursuant to the authority delegated to the Board of Land Appeals by the Secretary of the Interior, 43 CFR 4.1, the decision appealed from is vacated and remanded for proceedings consistent herewith.

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Martin Ritvo
Administrative Judge

I concur:

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Edward W. Stuebing
Administrative Judge

ADMINISTRATIVE JUDGE GOSS DISSENTING:

I feel it is within the discretion of BLM to follow the Secretarial pronouncements as to the public interest, as such public interest is perceived at the time BLM adjudicates the pending offers. The regulation as worded prior to the amendment did not void the lease applications, but merely stated "Ordinarily, the issuance of a lease to one who * * * would own less than 50 percent of the operating rights * * * will not be regarded as in the public interest." (Emphasis added.) 43 CFR 3130.4-4 (1974). Obviously, the circumstances set forth hereunder are not "ordinary." On April 2, 1976, when the amendment was proposed, Assistant Secretary Horton stated:

> Experience by Bureau of Land Management field offices show that this requirement serves no useful purpose. First, in the vast majority of cases, the government owns 50 percent or more of the mineral rights in any given tract. Secondly, private owners usually will lease their interest in these lands even when the government has refused to lease its interest because of the 50 percent limitation. When operations commence, the government then is obligated to petition the courts for a cease and desist order or sue for a proportionate share of the revenues. The public interest can be better served by issuing a lease for the government's fractional interest in mineral rights to a qualified applicant. [1/]

41 FR 14375.

On September 29, 1976, in connection with adoption of the amendment, Deputy Assistant Secretary Farrand repeated the Department position: "The proposal has not been modified because it is in the public interest to lease fractional oil and gas interests irrespective of the size of the interest." 41 FR 43149.

Before the Department may reject the Jones offers, such action must be expressly authorized by regulation. While it could be argued that prior to the effective date of the amendment, October 28, 1976, the offers could have been rejected, all authority to reject expired when the amendment became effective. If the leases are to be issued,

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1/ It will be noted that the Assistant Secretary's statement indicates the word "qualified" in that statement and in 30 U.S.C. § 226(c) (1970), infra, should be construed to include an applicant who controls less than 50 percent of the operating rights.

they must be issued to Jones as the first qualified person who made application, as mandated by 30 U.S.C. § 226(c) (1970):

> (c) If the lands to be leased are not within any known geological structure of a producing oil or gas field, the person first making application for the lease who is qualified to hold a lease under this chapter shall be entitled to a lease of such lands without competitive bidding.

See also 43 CFR 3110.1-6(a).

The question here is the date upon which the competing applications were made. Until the Jones applications are finally adjudicated Jones has a preference right to the leases. The Jones applications were filed on August 7, 1974, on October 18, 1976, and on October 19, 1976. Appellant's applications were received at 10 a.m. on October 28, 1976. The whole premise of the statute and regulations governing noncompetitive offers is that it is proper to reward the first qualified person who makes application. The majority opinion herein holds, in effect, that the Jones applications were properly filed; the decision classifies the offers of both Jones and appellant as suitable for entry in simultaneous drawings. A simultaneous drawing would, therefore, be proper only if all applications had been received at the same time. 43 CFR 3110.1-6(a).

Under the majority reasoning, the Jones applications were in no way void ab initio, but were subject to rejection. I submit that the Jones offers are not analagous to defective offers requiring additional filings in order to cure defects, in which event the subsequent filing date is crucial. Even if the offers had been defective, such defect would have been cured at the time the amended regulation became effective, i.e., at the first moment of October 28. In any event, they would be entitled to priority over applications filed at 10 a.m. that day. No authority has been cited under which the Board would have authority to delay by 10 hours the effective time of a regulation.

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Joseph W. Goss
Administrative Judge